90-1109

NO.

Supreme Court, U.S.
FILED
JAN 8 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS LYNN SMITH
Petitioner

VERSUS

HARBOR TOWING & FLEETING, INC.
Defendant

AND

CHOTIN TRANSPORTATION, INC.
Defendant-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the duty to provide a seaworthy vessel extends to a seaman excluded from Longshore and Harbor Worker's Compensation Act coverage, who is injured while performing traditional seaman's work aboard a non-employing shipowner's vessel?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

The Petitioner, Thomas Lynn Smith, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 6, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 910 F.2d 312.

JURISDICTION

The judgment of a panel of the United States Court of Appeals for the Fifth Circuit was entered on September 6, 1990. A timely petition for rehearing was denied on October 12, 1990, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE AND FACTS

On September 11, 1988, Thomas Lynn Smith was employed as a deck hand and member of the crew aboard the vessel M/V TODD G, a vessel owned and operated by Harbor Towing and Fleeting, Inc. (Harbor Towing).

On that date, the M/V TODD G was pushing two fuel barges down the Mississippi River to another facility. The two barges were owned by defendant-respondent, Chotin Transportation, Inc. (Chotin).

As part of his seaman duties, Thomas Lynn Smith had been ordered by the captain of the M/V TODD G to make up the rigging and join one of the Chotin barges to the other. As instructed, Smith went aboard one of the Chotin barges. In order to rig the Chotin barges together, it was necessary for Smith to unlink and straighten the wire cable from one of the stationary winches aboard the Chotin barge. The deck of the Chotin barge on which Smith was working was also covered in parts with diesel or hydraulic fluid. As Smith was attempting to unlink the cables aboard the Chotin barge, he slipped and fell on the oily deck.

Mr. Smith filed suit against his employer, Harbor Towing, under the Jones Act and general maritime law

alleging negligence of his employer and the unseaworthiness of the vessel M/V TODD G. Mr. Smith subsequently amended his complaint and added Chotin as a defendant alleging general maritime negligence and the unseaworthiness of the Chotin barges. The unseaworthiness claim was based upon this Court's decision in *Seas Shiping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946) to the effect that a shipowner's obligation of seaworthiness is not confined solely to seaman who perform the ship's service under immediate hire of the owner, but extends to those who render it with his consent or by his arrangement.

The trial court subsequently dismissed Mr. Smith's unseaworthiness claim against Chotin on Motion of Summary Judgment of Chotin holding that Chotin did not owe Smith a warranty of seaworthiness on its barges.

A timely appeal was taken by plaintiff and a decision was rendered by the Court of Appeals for the Fifth Circuit on September 6, 1990 holding that Smith could not assert a *Sieracki* unseaworthiness claim against Chotin.

Appellant, Thomas Lynn Smith, timely filed a petition for rehearing en banc with the Court of Appeals for the Fifth Circuit on September 20, 1990. Appellant's petition for rehearing was denied by the Fifth Circuit on October 12, 1990.

EXISTENCE OF JURISDICTION IN THE TRIAL COURT

The District Court for the Eastern District of Louisiana had jurisdiction over this claim under 46 U.S.C. Sec. 688 (Jones Act) and pursuant to the Court's admiralty jurisdiction.

REASONS FOR GRANTING THE WRIT

1.

THE OPINION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH THE SECOND CIRCUIT IN GENERAL MARITIME LAW, AN AREA WHERE THIS COURT HAS MANDATED UNIFORMITY OF DECISIONS

There now exists a direct conflict of the Fifth Circuit and the Second Circuit in the Admiralty jurisdiction. In the Second Circuit, the duty to provide a seaworthy vessel extends to a seaman, excluded from Longshore and Harbor Workers Compensation Act coverage, who is injured aboard a non-employing shipowner's vessel. *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2nd Cir. 1973).

In Mahramas, the plaintiff was a professional hairdresser employed by a hair dressing company and assigned to work in the beauty shop on the vessel S.S. INDEPENDENCE. While working aboard the vessel, the plaintiff was required to have seaman papers and sign ship's articles, thus establishing her seaman status. The plaintiff suffered injury to her lower back when a step on a ladder which she was climbing on the vessel gave way. Plaintiff brought various claims against her employer and the shipowner including, an unseaworthiness claim against the vessel owner. The vessel owner was not her employer. At trial, the trial court found against the plaintiff on the unseaworthiness claim and this decision was affirmed by the Second Circuit though on somewhat different legal basis than those relied on by the Court below.

The pertinent issue addressed by the *Mahramas*

Court concerned the propriety of the plaintiff's actions against the shipowner for unseaworthiness. As with the case at bar, *Mahramas* arose in the context "where a plaintiff-employee is injured aboard a ship but is not employed by the shipowner and is not covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 901 et seq." *Id.* at 169.

In relying upon this Court's decision in *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946), the Second Circuit held that there was no question that a non-employing shipowner owed a duty to provide a seaworthy vessel to a seaman performing the ship's service with the owner's consent or by his arrangement. *Id.* at 169.

In *Smith v. Harbor Towing & Fleeting, Inc.*, 910 F.2d 312 (5th Cir. 1990), plaintiff, Thomas Smith is in the same position as the *Mahramas* plaintiff. Mr. Smith was employed by one company (Harbor Towing), but was injured while performing his seaman duties aboard the shipowner's vessel with the consent and by the arrangement of the shipowner (Chotin). The Fifth Circuit confirmed that he did not come under the LHWCA ("It is true that as 'a member of the crew of any vessel,' Smith is excluded from LHWCA coverage." *Smith*, supra, at 314.)

The Fifth Circuit conceded that "as a 'maritime worker [ ] not covered by the LHWCA, ' Smith would arguably be entitled to a *Sieracki* remedy." *Id.* at 314. But the Court refused to bestow *Sieracki* seaman status on Smith arguing that a seaman performing a seaman's task on a nonemployer's vessel is not entitled to an unseaworthiness remedy. The opinion files directly in the face of a previous decision of another panel of the Fifth Circuit (*Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. Unit A 1981)), in which it was held that a longshoreman engaged

in the classic seaman's task of handling lines aboard a nonemployer's vessel, is entitled to an action for unseaworthiness under *Sieracki*. *Aparicio* at 1118. The *Smith* Court recognized the inconsistency of *Smith* and *Aparicio* ("we are not unmindful of the fact longshoreman performing a seaman's task on a nonemployer's vessel are entitled to an unseaworthiness remedy while seaman performing the same task are not." *Id.* at 315)

As the *Smith* Court pointed out, the broader question before this Court is whether *Sieracki* still survives with respect to those maritime workers not covered by the LHWCA. *Smith*, supra, at 313. The *Smith* Court noted that the Fourth Circuit and Ninth Circuit have reached the conclusion that the 1972 amendments completedly abolished the *Sieracki* unseaworthiness action, although the Fifth Circuit (in *Aparicio*) has reached a less sweeping conclusion. *Id.* at 313-14. This broader conflict among the Circuits is still another reason why this Court should review the case at bar.

Petitioner respectfully submits that, consistent with this Court's decision in *Sieracki* and the decision of the Second Circuit in *Mahramas*, he is entitled to an unseaworthiness remedy against Chotin. If there is to be any efficacy to the jurisprudential requirement that admiralty law must be consistent throughout the United States, review of the Fifth Circuit's opinion in this instance is required.

CONCLUSION

Conflicts in an area of the law requiring uniformity must be addressed. In the Second Circuit, a non-employing shipowner owes a duty to provide a seaworthy vessel to a seaman performing the ship's service with the owner's consent or by his arrangement. That same seaman has no such remedy in the identical situation in the Fifth Circuit. This issue is simple and direct. Only this Honorable Court has the authority to make the federal admiralty law "coextensive with, and operating uniformity in, the whole country." *Moragne v. States Marine Lines, Inc.* 398 U.S. 375 (1977). Petitioner respectfully prays that writs be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he had this 7th day of January, 1991 mailed a copy of the foregoing pleading to the attorneys of record for all other parties in this action by placing same properly addressed in the U.S. Mail with sufficient postage to insure delivery.

_____

A. REMY FRANSEN, JR.

APPENDIX A

Thomas Lynn SMITH,
Plaintiff-Appellant,

v.

HARBOR TOWING & FLEETING, INC.
Defendant

Chotin Transportation Co., Inc.
Defendant-Appellee.

No. 89-3762

United States Court of Appeals,
Fifth Circuit

Sept. 6, 1990.

Jones Act seaman who was injured while performing seaman's work aboard a nonemploying shipowner's vessel sued the shipowner for unseaworthiness. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., granted owner's motion for summary judgment, and seaman appealed. The Court of Appeals, Thornberry, Circuit Judge, held that the seaman could not assert a *Sieracki* seaworthiness couse of action against a vessel on which he was not crew member.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before Thornberry, Gee, and Smith, Circuit Judges.

THORNBERRY, Circuit Judge:

This appeal raises the sole issue of whether a Jones Act seaman who is injured while performing seaman's work aboard a nonemploying shipowner's vessel can sue the shipowner for unseaworthiness as a *Sieracki* seaman. We hold that a Jones Act seaman cannot assert a *Sieracki* unseaworthiness cause of action against a vessel on which he is not a crew member.

Facts and Procedural History

At the time of his injury, plaintiff Thomas Lynn Smith (Smith) was a deckhhand and crew member aboard the M/V TODD G, a tug owned and operated by his employer, Harbor Towing and Fleeting, Inc. (Harbor Towing). Harbor Towing supplied tugs and fleeting facilities to shift and fleet various barges, including barges owned by Chotin Transportation, Inc. (Chotin).

On September 11, 1988, the M/V TODD G was preparing to push two fuel barges owned by Chotin to another fleeting facility. The captain of the M/V TODD G ordered Smith to board the barges and rig them together for towing. Smith claims that in order to rig the barges together, it was necessary to straighten a tangled wire cable attached to a barge winch. While he was trying to untangle the kinked wire, Smith allegedly injured his arm and back when he slipped on some diesel oil on the deck of one of the barges.

The two Chotin barges, the CH-2084 and CH-1882, were nonpropelled barges that could be navigated only with the aid of tugs or towboats. Apart from Smith, they were unmanned at the time of the accident and Chotin states that they have never had a crew. Chotin also claims

that both barges had been inspected by the Coast Guard and received their biannual Certificates of Inspection on September 9, 1988.

Smith sued Harbor Towing under the Jones Act, 46 U.S.C. App. Sec. 688, and the general maritime law, seeking $5.25 million in actual and punitive damages. He also asserted a claim against Chotin for general maritime negligence and for breaching the warranty of seaworthiness. Smith claims that the presence of diesel oil on the deck and the kinked winch wire rendered the Chotin barges unseaworthy. Harbor Towing filed a cross-claim against Chotin seeking indemnity and contribution for any amounts for which it may be liable, claiming that any damages were caused by Chotin's fault, negligence, and by the unseaworthiness of Chotin's barges.

The district court concluded as a matter of law that because Smith was not a crew member as to either of Chotin's barges, Smith was owed no duty of seaworthiness. Accordingly, it granted Chotin's motion for partial summary judgment. After the district court entered a final judgment pursuant to Fed.R.Civ.P. 54(b), Smith brought this appeal.

Discussion

The parties agree that Smith was a seaman with respect to his employer's tug, the M/V TODD G. There is no doubt that the Chotin barges are vessels. But due to the transitory nature of his work aboard these barges, Smith concedes that he does not qualify as a Jones Act seaman on Chotin's barges. See *Offshore Co. v. Robinson*, 266 F.2d 769, 779 (5th Cir. 1959) (requiring, among other things, that the maritime worker be permanently assigned to a vessel or perform a substantial part of his work on a vessel).

Smith argues, however, that Chotin owed him a duty of seaworthiness on the grounds that he qualifies as a "*Sieracki* seaman."

In *Seas Shipping v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), the Supreme Court rejected the notion that the vessel owner's duty to furnish a seaworthy vessel extended only to those maritime workers employed by the vessel owner. *Id.* at 90-94, 66 S.Ct. at 875-77. The Court extended a cause of action for unseaworthiness to longshoreman "doing a seaman's work and incurring a seaman's hazards." *Id.* at 99, 66 S.Ct. at 880. Subsequently, the Court recognized that an implied warranty of workmanlike performance ran from the stevedore by contract to the shipowner. Thus, the shipowner was entitled to full indemnity if the plaintiff's employer breached this implied warranty. See *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 133, 76 S.Ct. 232, 237, 100 L.Ed. 133 (1956). The result of these holdings was to expose a stevedore to liability even though section 905 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) expressly limited the employer's liability to worker's compensation. *See* 33 U.S.C. Sec. 905(a).

In 1972 Congress amended the LHWCA to add section 905(b), which provides that any "person covered" under the Act may no longer bring an action against a third-party vessel owner "based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred." 33 U.S.C. Sec. 905(b). Thus, Congress abolished the *Sieracki* unseaworthiness cause of action and the *Ryan* indemnity action for those employees covered by the LHWCA. See *Edmonds v. Compagnie Generale Transatlantigue*, 443 U.S. 256, 260, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979).

Following the 1972 amendments, courts were faced with the question of whether *Sieracki* still survived with respect to those maritime workers not covered by the LHWCA. Some courts have reached the conclusion that the 1972 amendments completely abolished the *Sieracki* seaworthiness action.[1] In *Aparicio v. Swan Lake*, 643 F.2d 1109 (5th Cir. Unit A Apr. 1981), however, this court reached a less sweeping conclusion. Aparicio, a harbor worker employed by the Panama Canal Company, was injured while handling the lines of a vessel in the Canal Zone. As a federal employee working in the Canal Zone and covered by the Federal Employees' Compensation Act(FECA), 5 U.S.C. Secs. 8101-93, Aparicio was not covered by the LHWCA. In *Aparicio*, we concluded that maritime workers covered by FECA, but who were not covered by the LHWCA, were not barred by the 1972 amendments from asserting claims as a *Sieracki* seaman. *Id.* at 1116-18. Because Aparicio was a longshoreman engaged in the classic seaman's work of handling the lines of a vessel, we held that he was entitled to an action for unseaworthiness under *Sieracki*. *Id.* at 1114 & n. 7. Two years later, in *Cormier v. Oceanic Contractors, Inc.* 696 F.2d 1112, 1113 (5th Cir.1983), cert. denied, 464 U.S. 821, 104 S.Ct. 85, 78 L.Ed.2d 94 (1983), this court applied *Aparicio* and held that a welder working aboard a vessel in a foreign country, and thus beyond the reach of the LHWCA, was entitled to *Sieracki* seaman status.

Smith would have this court extend the holdings of *Aparicio* and *Cormier* to Jones Act seamen. It is true that as "a member of the crew of any vessel," Smith is excluded

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[1] See e.g., *Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380,. 1382 (9th Cir. 1981); *United States Lines, Inc. v. United States*, 593 F.2d 570, 572 (4th Cir. 1979); *Grice v. A/S J. Ludwig Mowinckels*, 477 F.Supp. 365, 371 (S.D. Ala. 1979).

from LHWCA coverage. 33 U.S.C. No. 902(3)(G). Thus, as a "maritime worker [ ] not covered by the LHWCA,"Smith would arguably be entitled to a *Sieracki* remedy. *Aparicio*, 643 F.2d at 1118. This court, however, has refused to extend the special protections of *Sieracki* seaman status to Jones Act seamen injured on vessels on which they are not crew members. In *Bridges v. Penrod Drilling Co.*, 740 F.2d 361 (5th Cir.1984), plaintiff Bridges was a seaman by virtue of his assignment as a roustabout aboard his employer's drilling barge the PENROD 72. He was ordered to board and unload a third-party supply vessel, the THOMAS DRAYTON, and was injured when a runaway drum on the deck crushed him. Bridges asserted an unseaworthiness cause of actiion against the owner of the supply vessel. The court rejected his claim and held that a seaman injured while performing the duties of a longshoreman, in a setting not subject to the LHWCA, was not a *Sieracki* seaman. *Id.* at 364.

The court explained that unlike the plaintiffs in *Aparicio* and *Cormier*, who were not Jones Act seamen, there was no need for Bridges to leave his regular seaman status and join the pockets of *Sieracki* seamen:

> As a member of the crew of the special purpose vessel PENROD 72, Bridges was possessed of the full range of traditional seaman's rights and remedies: maintenance and cure and a Jones Act negligence claim against his employer as employer, an unseaworthiness claim against his employer as vessel owner for any injury on the PENROD 72, and a negligence claim in maritime tort for Offshore's breach of duty of reasonable care under the circumstances. In order to achieve adequate protection it was not necessary that Bridges be characterized as a remnant *Sieracki* seaman of the THOMAS DRAYTON. It cannot

> be said that Bridges was either "covered by no compensation act or by a compensation scheme that is far more stringent in its benefits than is the LHWCA." *Aparicio*, 643 F.2d at 1118 n. 17. . . .One with seaman status does not become additionally a *Sieracki* seaman by doing stevedoring work which might be styled traditional seaman's duties.

Id., *see* also *Book v. Nordrill, Inc.*, 826 F.2d 1457, 1463 (5th Cir.1987) (holding that roustabout could not assert an unseaworthiness action against owner of vessel because he was not assigned to the vessel or a member of its crew).

We believe that *Bridges* controls this case. Like the plaintiff in *Bridges*, Smith has a variety of possible remedies as a Jones Act seaman: maintenance and cure and a Jones Act negligence claim against his employer as employer, an unseaworthiness claim against his employer as vessel owner for any injury on the M/V TODD G, and a negligence claim in maritime tort for Chotin's breach of duty of reasonable care under the circumstances. *Bridges*, 740 F.2d at 364. Thus, there is no need for him to join the pocket of *Sierachi* seamen.

Conclusion

In summary, we hold that a Jones Act seaman, who possesses the full range of traditional seamen's rights and remedies, cannot maintain a *Sieracki* seaworthiness action against a vessel on which he is not a crew member. In reaching this conclusion, we are not unmindful of the fact that longshoremen performing a seaman's task on a nonemployer's vessel are entitled to an unseaworthiness remedy while seamen performing the same task are not. Although this court may wish to reexamine this issue en

banc, until then the holding in *Bridges* controls this case. Thus, we hold that Smith may not assert a *Sieracki* unseaworthiness claim against Chotin, and the judgment of the district court is hereby

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

THOMAS LYNN SMITH	*	CIVIL ACTION
	*	
VS.	*	NO. 88-4785
	*	
HARBOR TOWING AND FLEETING, INC., ET AL	*	SECTION "K" (5)
	*	
* * * * * * *	*	

ORDER AND REASONS

This matter comes before the Court on motion for partial summary judgment filed by Chotin Transportation, Inc. ("Chotin"). Having thoroughly reviewed the record, the memoranda of counsel and the law, the Court has determined that partial summary judgment is appropriate for the reasons set forth hereinafter.

The plaintiff, Thomas Lynn Smith ("Smith"), has sued the defendants, Harbor Towing & Fleeting, Inc. ("Harbor Towing") and Chotin for personal injuries allegedly sustained when he slipped on some diesel oil on the deck of one of Chotin's barges. He has sued Harbor Towing under the Jones Act and general maritime law. His claim against Chotin is for general maritime law negligence only. Harbor Towing filed a cross-claim against Chotin seeking indemnity and contribution for any amounts for which it may be liable, claiming said damages were caused by Chotin's fault, neglect and lack of care, and by the unseaworthiness of the Chotin barges.

Harbor Fleeting supplied tugs and fleeting facilities to shift and fleet various Chotin barges. Smith, an employee of Harbor Fleeting, claims to have been injured when tying the two Chotin barges together in preparation for their movement. It is undisputed that Smith was a seaman with respect to the Harbor Fleeting tug. At issue in this motion is whether Smith was owed a warranty of seaworthiness from Chotin, as owner of the barges.[1]

The Fifth Circuit was held that a plaintiff's status as a crew member of one vessel does not enhance his relationship to a second vessel. *Dove v. Belcher Oil Co.*, 686 F.2d 329 (5th Cir. 1982). In addition, the traditional test for determining seaman status set forth in *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), is applied in determining whether an plaintiff is a seaman owed the warranty of seaworthiness as to that second vessel. *Book v. Nordrill, Inc.*, 826 F.2d 1457 (5th Cir. 1987), *Dove*, supra. It is undisputed here that Smith was not permanently attached, nor did he perform a substantial part of his work aboard, the Chotin barges. This Court's analysis in this matter need go no further, and it is not free to adopt an analysis not recognized by the Fifth Circuit in formulating this rule concerning the underpinnings and subsequent vitality of *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).[2]

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[1] The plaintiff had previously represented to the Court that he intended to make no claim for unseaworthiness of the Chotin barges. (Doc. 33). Nonetheless, the alleged warranty of seaworthiness owed Smith at issue in this motion forms the only basis of the claim of unseaworthiness raised in Harbor Towing's cross-claim, Harbor Towing having presented no other argument relative to its application in this matter.

[2] The Court does not find reason to ignore this rule in the dicta contained in Baker v. Raymond International, Inc., 656 F.2d 173, 181 (5th Cir. 1981) that "[t]he duty to provide a seaworthy vessel is absolute and extends not only to the owner's employees but to all who do seaman's

The Court notes that the leading cases cited by counsel actually presume the application of the above cited rule. In *Bridges v. Penrod Drilling Co.*, 740 F.2d 361, 364 (5th Cir. 1984), the Fifth Circuit held that a plaintiff who was a seaman as to his employer's vessel could not claim the unseaworthiness of a second vessel by joining a "pocket of *Sieracki* seaman": "One with seaman status does not become additionally a *Sieracki* seaman by doing stevedoring work which might be styled traditional seaman's duties." Of course, such legal gymnastics could have been avoided had the plaintiff's ability to sue the vessel for unseaworthiness been recognized among the traditional seaman's remedies enumerated therein, or had the plaintiff otherwise qualified as a seaman with respect to that vessel.

In *Burks v. American River Transportation Co.*, 679 F.2d 69 (5th Cir. 1982), a longshoreman sought seaman status in order to sue the vessel owner for unseaworthiness and avoid the limitations presented by the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act. The traditional *Robison, supra,* test was utilized to determine whether he qualified as a "member of the crew" for purposes of 33 U.S.C. ?902(3) with regard to the allegedly offending vessel, independent of any relationship he may have enjoyed as to a vessel owned by his employer and upon which he worked.

Here, the facts present a simpler model. This seaman was performing traditional seaman's duties on board a

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Footnote 2 continued.
work." While the quoted language summarizes that part of Sieracki, supra which held that the warranty of seaworthiness is not dependent on an employment relationship with the owner, it does not address the issue presented in this matter.

second vessel as to which he did not qualify as a member of the crew. The plaintiff is owed no warranty of seaworthiness by the owner of this second vessel under *Book, supra* and *Dove, supra.* This being the sole basis of the cross-claim for indemnity and contribution against Chotin,

IT IS ORDERED that the motion for partial summary judgment filed by Chotin Transportation, Inc., is hereby GRANTED.

May 31st, 1989 UNITED STATES DISTRICT JUDGE
New Orleans, Louisiana (illegible)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(2)

No. 90-1109

In The

Supreme Court of the United States

October Term, 1990

THOMAS LYNN SMITH,

Petitioner,

v.

HARBOR TOWING & FLEETING, INC. AND CHOTIN TRANSPORTATION, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The sole question presented for review is whether the owner of a vessel owes a warranty of seaworthiness to a worker who is neither employed by the vessel owner nor engaged as a member of the crew of its vessel.

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STATEMENT OF THE CASE

The Petitioner was employed by Harbor Towing & Fleeting, Inc. to work as a deckhand aboard its harbor tugs. As its name suggests, Harbor Towing & Fleeting is a harbor fleeting service. Its facility is located on the lower Mississippi River near New Orleans, where it fleets and shifts the barges of its customers for a fee. Chotin Transportation,[1] the Respondent, operates an inland barge line.

On the date of his alleged accident, the Petitioner had been assigned to work as a member of the crew of one of his employer's harbor tugs. The captain of the tug instructed the Petitioner to make arrangements to ready two tank barges for towing across the Mississippi River. In the course of securing the barges together,[2] the Petitioner allegedly slipped, fell, and injured himself. The two barges were owned by the Respondent.

The two barges were unmanned. They had no crew of their own, nor were they designed with crew quarters or any other facilities to accommodate a crew. The barges lacked any motive power and could be navigated only through the use of harbor tugs and inland tow boats. In all essential respects, these were typical inland cargo barges, the floating equivalent of railroad tank cars. They were routinely relinquished to the care, custody and control of third parties who were relied upon to exercise that

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[1] Chotin Transportation, Inc. is a wholly-owned subsidiary of Midland Enterprises Inc.

[2] Contrary to the statement made in the Petitioner's brief, the two barges were not yet being moved at the time of the accident; they were still secured in the mooring facility operated by Harbor Towing & Fleeting.

degree of skill and care that was commensurate with their undertaking.

The Respondent had no personnel stationed to supervise barge operations, but it did exercise the normal prerogatives of a vessel owner. Prior to the incident sued upon, the Respondent arranged for a barge service to clean both barges and to have the cargo compartments certified as gas-free by a marine chemist. As owner, the Respondent had also made arrangements for both barges to be inspected by the United States Coast Guard, which issued the appropriate certificates of inspection. Less then twenty-four hours later, the barges were taken to the fleeting facility operated by the Petitioner's employer.

Neither the Petitioner's employer nor the particular harbor tug upon which he was working had any permanent working relationship with the Respondent's barges, and the Petitioner's presence on those two barges was to perform a task that was entirely transitory in nature. That task was to be carried out without any supervision whatsoever by the Respondent.

At issue here is a single claim: whether the Respondent owed a warranty of seaworthiness to the Petitioner.

SUMMARY OF ARGUMENT

I

The warranty of seaworthiness, as first developed and later refined in American maritime law, has always been confined to the *members of the crew* of a given vessel. Although there have been some permutations in the law

regarding the definition of a crewmember, the warranty of seaworthiness has never been applied from a vessel to the employee of a third-party contractor whose presence aboard the vessel is in a capacity other than that of a crewmember.

II.

The decision rendered in this case in no way disrupts the uniformity of admiralty law, but instead reaches a result in harmony with relevant precedent. The only inconsistency in maritime law which relates to the issue in this case concerns the elasticity of the definition given to a seaman or members of the crew. In that respect, this case implicates another matter presently before the Court, *McDermott International, Inc. v. Wilander*, No. 89-1474.

ARGUMENT

I

The present matter is not difficult to analyze. The Petitioner undoubtedly qualifies as a Jones Act seaman with respect to his employer's vessel: he was a member of the crew of that vessel, assigned to work aboard it as a deckhand. The Petitioner was not a member of the crew of the two unmanned tank barges, which he boarded to perform a transitory task, and which were brought within the scope of his own vessel's operations only in a transient fashion. As to those two barges, the Petitioner's seaman status was unavailing; it did not entitle him to

extra status or benefits, nor did it enlarge the barge owner's obligations.

The barge owner owed the same general duty to all who came aboard its vessels: the duty of exercising reasonable care under the circumstances. *Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). That duty was not heightened or increased by the Petitioner's status vis-a-vis his employer's vessel, and arguably might even by decreased, given that the Petitioner's employer was hired and paid to perform these services, and held itself out as having expertise in the area. The Petitioner's sole remedy against the Respondent is for negligence.

That is not to say that no confusion attends the subject. What has thrown a kink in an otherwise straightforward analysis of a typical maritime personal injury claim is the lingering effect of the decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed.2d 1099 (1948), a case which, for most practical purposes, was overruled when Congress amended the Longshore and Harbor Workers' Compensation Act in 1972.[3] *Sieracki* gave stevedoring employees an unseaworthiness remedy against vessel owners, even though the workers were not employed by the vessel owner. The rationale by which the Court arrived at its holding that an employment relationship was not a necessary ingredient for the application of the warranty has considerable potency even now. What has led to confusion is the reasoning that,

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[3] See *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979).

since stevedores did the work of "seamen," they were entitled to seamen's remedies. That holding no longer has potency, but it has been carelessly engrafted upon a variety of situations in which other maritime workers were thought to be performing the tasks of "seamen." What the Court said in *Sieracki*, however, is that stevedores had replaced the "members of the crew" of the ship in loading and unloading cargo, and it was this historical equivalency in status which served as a basis for extending the warranty of seaworthiness. To the *Sieracki* court, the job of a longshoreman was equated with that of a crew member: if *Sieracki* is read closely, it can be concluded that its holding reserves the remedy for unseaworthiness only to those workers who otherwise qualify as members of a vessel's crew, by doing the work of crew members. No distinction should exist between seamen and crew members, and therein lies the proper resolution of this case.

* * *

The *Sieracki* decision cannot be understood unless its context and jurisprudential antecedents are closely considered. The warranty of seaworthiness owed to seamen has been recognized in American maritime law ever since *The Osceola*, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760 (1903), a decision which laid down a number of rules which were considered settled propositions. Among them was the principle that the vessel and its owner were "liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship. . . ." 189 U.S. at 175, 23 S.Ct. at 487. Later, the Court explained that the principles recognized in *The Osceola*, including the unseaworthiness remedy, formed "the general doctrine

concerning rights and liabilities of the parties when *one of a crew* sustains injuries while on a vessel in navigable waters." *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 258, 42 S.Ct. 475, 476, 66 L.Ed. 927 (1922) (emphasis added).

Central to the rationale underlying the unseaworthiness remedy was the concept of an employment relationship between the seaman and the vessel owner. In *The Osceola*, for example, the Court upheld the validity of the "fellow servant" rule, absolving a vessel owner from liability to its seamen employees if injuries were caused by the negligence of fellow servants. The Court did not address the question of whether the owner was relieved of liability when an unseaworthy condition was caused by the negligence of fellow servants. That question was answered in *Carlisle Packing Co. v. Sandanger, supra*, which held that the unseaworthiness remedy was available "without regard to negligence. . . . " 259 U.S. at 259, 42 S.Ct. at 477, 66 L.Ed. at 930. This holding was amplified and explained in *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 102, 64 S.Ct. 455, 459, 88 L.Ed. 561 (1944):

> "In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee with safe appliances and a safe place to work, is nondelegable and not qualified by the fellow servant rule."

The seaman's remedy for unseaworthiness was thus conceived as an adjunct to the employer's duty to provide a safe place to work, transported to the context of vessel

operations.[4] As originally envisioned, the seaworthiness doctrine was dependent upon an employer-employee relationship; it was confined to seamen who were employed by the vessel's owner or operator, and those seamen were understood to be members of the vessel's crew.

* * *

Between the passage of the Merchant Marine Act of 1920 ("Jones Act") and the Longshore and Harbor Workers' Compensation Act ("LHWCA") in 1927, stevedoring employees occupied an uncertain place in the law of maritime torts. An early definition of a Jones Act seaman, excluding stevedores from coverage, was given by the Ninth Circuit:

> "The [Jones Act] was not intended to and does not enlarge the definition of 'seaman' as it was then understood and accepted in admiralty law. Generally speaking, a seaman is any one who, by contractual employment with the owner, master, or charterer of a vessel, serves the vessel in navigation. He is not necessarily a sailor. He may be a cook, fireman, or even a bartender. A stevedore renders no service in actual navigation. It is true that he renders service incidental to navigation in loading and unloading vessels, a service which is maritime in its nature but he is a landsman and he does not belong on a vessel nor does he go with the vessel."

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[4] See *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208 (1914) (longshoreman injured prior to passage of Jones Act was owed a safe place to work by his employer.)

Cassil v. United States Emergency Fleet Corp., 289 F.2d 774, 776 (CA9 1923).

Prior to the passage of the LHWCA, this Court reached a contrary result, holding that stevedore employees were entitled to the Jones Act remedy. *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157 (1926).[5] It was the Court's view that longshoremen should be considered "seamen" under the Jones Act:

> "It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. * * * . . . we are of the opinion . . . that in this statute 'seamen' is to be taken to include stevedores employed in maritime work on navigable waters . . . whatever it might mean in laws of a different kind."
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> *Id.*, 272 U.S. at 52, 47 S.Ct. at 19, 71 L.Ed. at 160.

The LHWCA was enacted within six months after the *Haverty* decision was rendered, and it was then acknowledged that Congress intended "to confine the benefits of the Jones Act to the members of the crew of a vessel," and to withdraw that remedy from stevedores who were not crew members. *Swanson v. Marra Bros.*, 328 U.S. 1, 7, 66 S.Ct. 869, 872, 90 L.Ed. 1045, 1049 (1946).

Nevertheless, the treatment of longshoremen as seamen was considered a fixed principle by the *Sieracki* court:

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[5] See also *Uravic v. F. Jarka Co.*, 282 U.S. 234, 51 S.Ct. 111, 75 L.Ed. 312 (1931).

> "Historically, the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew."
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> 328 U.S. at 96, 66 S.Ct. at 878, 90 L.Ed. at 1107.

Longshoremen, it was thought, faced the same character of risks, perils and hazards ordinarily confronting crewmembers, and were therefore entitled to the same general maritime law remedies against a vessel owner. This became the central holding in *Sieracki*:

> " . . . for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing seaman's work and incurring a seaman's hazards."
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> 328 U.S. at 99, 66 S.Ct. at 879-80, 90 L.Ed. at 1109.

This holding relied heavily upon the Court's perception that stevedoring work aboard a vessel in navigable waters constituted traditional "seaman's" work,[6] and upon its observation that the "trend and policy" of past jurisprudence favored extension of seamen's remedies to stevedores.

Past jurisprudence did indeed equate longshoremen with seamen. The major obstacle which the Court faced in *Sieracki* was that past jurisprudence also premised a seaman's remedy against a vessel owner upon an

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[6] The majority's point of view was sharply disputed in Justice Frankfurter's dissent, 328 U.S. at 105, 66 S.Ct. at 882, 90 L.Ed. at 1112.

employment relation with that owner. Before *Sieracki*, the "norm of the liability" in unseaworthiness claims had been the case of seamen under contract to a vessel owner. 328 U.S. at 90, 66 S.Ct. at 875, 90 L.Ed. at 1104. Thus, the *Sieracki* court framed the issue before it as whether longshoremen-seamen could sue for unseaworthiness when they had no employment contract with the vessel owner. *Sieracki*, by its own terms, expanded the norm of liability only in the sense that it eliminated the necessity of the employment relation. In the Court's view, stevedores were functionally equivalent to crew members aboard a ship, doing work historically performed by a crew. The issue decided in *Sieracki* was whether a vessel owner could escape liability for unseaworthiness by "having all who *man the ship*" hired by third parties. 328 U.S. at 92, 66 S.Ct. at 876, 90 L.Ed. at 1105 (emphasis added). The Court answered this question by stating that the owner should not be able to avoid its obligations by "parcelling out" its operations to intermediary employers who would then "take over portions of the ship's work. . . . " 328 U.S. at 95, 66 S.Ct. at 877, 90 L.Ed. at 1106.

The *Sieracki* court took as a given that the work of a stevedore represented a "specialization in labor and skill brought about by modern division of labor" and that stevedoring work actually belonged in the classification peculiar to a seaman's employment. 328 U.S. at 100, 66 S.Ct. at 880, 90 L.Ed. at 1109. This view, however, accurate it might have been, was entirely discarded when Congress amended the LHWCA to eliminate the *Sieracki* remedy for longshoremen. Two remnants of the *Sieracki* decision have nevertheless survived. First, *Sieracki* has been given limited application to claims of longshoremen

who are exempted from coverage under the LHWCA.[7] Second, *Sieracki* has been cited as authority for the proposition that the vessel owner need not be the direct employer of the seaman aboard its vessel to expose it to liability for unseaworthiness.

It is this second proposition that the Petitioner would parlay into a favorable holding. However, the *Sieracki* remedy is not as broad as the Petitioner conceives. Throughout *Sieracki*, the Court makes reference to the fact that longshoremen did work previously done by the ship's crew, those who "man the ship." *Sieracki* did not envision extending the warranty to workers whose services were not usually undertaken by "members of the crew." As in *Haverty*, the chief policy consideration that militated for application of the warranty to longshoremen was that they performed maritime services "formerly rendered by the ship's crew." Without this limitation, the warranty would have been owed to every variety of the multitude of shore-based personnel who provision, repair, inspect and otherwise provide services to a vessel.

The proposition that a vessel owner owes a warranty of seaworthiness to a "member of the crew" of its vessel, even though it does not directly employ that crew member, originated with *Sieracki*, and was later applied in the context of offshore oil operations, involving specialized vessels typically crewed by a variety of independent contractors.[8] Likewise, the *Sieracki* rationale applies to a

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[7] See pp. 14-15, *infra*.

[8] See, e.g., *Davis v. Associated Pipe Line Contractors, Inc.*, 305 F.Supp. 1345 (W.D.La. 1968); *Hebert v. California Oil Company*, 280 F.Supp. 754 (W.D.La. 1967).

vessel owner that bareboat charters its vessel to another party, which in turn employs the crew.[9]

The common thread that runs through these decisions is the requirement that the warranty be confined to members of the crew. This fact is overlooked by the Petitioner, but it was understood by the Court below, which readily concluded that, since the Petitioner did not qualify as a member of the crew of the Respondent's barges, no warranty of seaworthiness was owed.

II.

To the extent that the warranty of seaworthiness should only extend to "members of the crew" of a vessel, the question presented by this case implicates the issue raised in *McDermott International, Inc. v. Wilander,* No. 89-1474, which involves the legal definition of seaman status.

A good deal of confusion has been engendered in the jurisprudence over the definition of the term "seaman." Most of the attention given to the subject has addressed the issue in the Jones Act context. Within the Fifth Circuit, the defining principles were established in response to technological advances in the offshore oil industry, related to the use of movable drilling rigs. In *Offshore Co. v. Robison,* 266 F.2d 769 (CA5 1959), the Fifth Circuit was confronted with this new class of special-purpose "vessel," far removed in character from any type of watercraft

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[9] See, e.g., *Baker v. Raymond Intern., Inc.,* 656 F.2d 173, 184 (CA5 1981); *Solet v. M/V CAPT. H. V. DUFRENE,* 303 F.Supp. 980 (E.D.La. 1969).

that preceded it. These drilling rigs did not ply the waters of the world, but served their primary function by staying afloat in one place for extended periods of time, drilling holes in the seabed. In determining the rights and remedies of the workers employed aboard such vessels, the Fifth Circuit effectively created a new class of seamen; in doing so, it articulated principles that apply uniformly to a roustabout on a semi-submersible drilling rig and an able bodied seaman on a more conventional ship. Both workers attain seaman status by having a more or less permanent assignment to a vessel, or performing a substantial portion of their work there, and by doing work that contributes to the vessel's function or mission. Both types of workers can be considered members of their vessel's crew.

While other circuit courts have taken a less expansive view of the subject,[10] it is uniformly recognized that coverage under the Jones Act and the LHWCA is mutually exclusive. The Jones Act applies only to "seamen," while the LHWCA excludes coverage for "a master or member of a crew of any vessel." 33 U.S.C. §§902(3)(G) and 903(a). As used in the two statutes, the terms "seaman" and "member of a crew" have been held to be interchangeable. Thus, the Jones Act remedy for seamen is restricted to members of the crew, as that term is used in the LHWCA.

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[10] See *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054, 1061 (CA7 1984) and *Simko v. C&C Marine Maintenance Co.*, 594 F.2d 960, 964-65 (CA3 1979).

With respect to coverage under the LHWCA, a legal anomaly does exist, involving an inter-circuit conflict of opinion. In *Aparicio v. Swan Lake*, 643 F.2d 1129 (CA5 1981), the Fifth Circuit held that a maritime employee who was exempted from LHWCA coverage, and who was not entitled to bring a Jones Act claim, could nevertheless sue a vessel owner for unseaworthiness. This decision was entirely inconsistent with the holding of the Ninth Circuit in *Normile v. Maritime Company of the Philippines*, 643 F.2d 1380 (CA9 1981). This inter-circuit conflict[11] has never been addressed by this Court.[12]

This conflict, however, gives no real solace to the Petitioner. Even if the Fifth Circuit's holding in *Aparicio* is correct, the *Sieracki* remedy would be confined to longshoremen, exempted from the LHWCA, who can claim status as erstwhile seamen aboard the offending vessel, consistent with the *Sieracki* rationale. The Petitioner cannot.

The Petitioner in the instant matter was clearly a member of the crew of his employer's vessel, and entitled to sue his employer under the Jones Act. Under the Fifth Circuit's criteria for determining seaman status – at issue in the *Wilander* case – he was clearly not a member of the crew of the Respondent's unmanned vessels. The reason

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[11] See also *United States Lines, Inc. v. United States*, 593 F.2d 570 (CA4 1979) and *Grice v. A/S J. LUDWIG MOWINCKELS*, 477 F.Supp. 325 (S.D.Ala. 1979).

[12] See *Cormier v. Oceanic Contractors, Inc.*, 696 F.2d 1112 (CA5) cert. den., 464 U.S. 821, 104 S.Ct. 85, 78 L.Ed.2d 94 (1983).

that the Petitioner lacked seaman status as to these vessels was not because of the nature of his duties, but because of the transitory and insubstantial nature of his assignment.

The case is no different than that presented by a shore-based harbor pilot, radio technician, diesel mechanic, or other specialized contractor who boards a vessel to perform a single task. It would not be doubted that a ship's captain, radio officer, engineer or tankerman qualifies for seaman status, even if their duties may be substantially identical to those carried out by shore-based workers. The difference is in the duration of the assignment and in the anticipated scope of the work to be performed.

The petitioner's argument would transform all such shore-based personnel into special-category seamen whenever they board a vessel to provide services, if those services are sufficiently nautical in character to be considered seamen's work. This expansive notion discredits the connection that ought to exist between an individual seaman and a particular vessel, which is the irreducible basis that supports a worker's status as a member of a crew.

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The only decision sited by the Petitioner as adverse to the decision below, and as threatening the harmony of maritime law, is *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (CA2 1973), a decision that is of no particular importance to the analysis of seaman status. The *Mahramas* decision involved a hairdresser employed by a beauty shop aboard a passenger liner. She was

required to have seaman's papers and sign ship's articles, but she was not directly employed or paid by the vessel owner. The Second Circuit, with its focus upon "tradition," seemingly could not accept a hairdresser as a seaman, being of the belief that the plaintiff "was not performing any of the historic functions of a ship's crew"; nevertheless, the plaintiff was considered to be a "seaman" for purposes of the Jones Act. *Id.* at 170. The plaintiff was also given a remedy for unseaworthiness for her shipboard accident, because she performed "ship's service" by arrangement of the owner. *Id.* at 169. This decision thus reaches the right result under the wrong rationale. Surely a hairdresser in a beauty salon aboard a luxury passenger vessel is as much a member of that specialized ship's crew as any roustabout assigned to work on a movable drilling rig, or, for that matter, the cook, fireman and bartender referred to in an earlier Ninth Circuit decision. "Seamen" do not have to be "sailors." The notion of "historic functions" in this context is an irrelevance. And, if the "historic functions" of sailors are deemed important, the fact remains that the Respondent's barges, like thousands of barges operating on the inland waterways, are intended to be unmanned, and carry no crew.

CONCLUSION

It is not the ambition of this brief to propose a formula which would resolve the problems that attend the definition of seaman status. It is instead sufficient to observe that any criteria used to define a "seaman" will

necessarily define the scope of the warranty of seaworthiness. There should be no gap between the two: if a worker is considered a seaman, a warranty of seaworthiness should be owed by the vessel or vessels to which that status is attached. The warranty of seaworthiness ought not to be detached from the vessel upon which a worker is a member of the crew and applied to every other vessel where the worker may, from time to time, perform incidental "seaman's" work.

Respectfully submitted,

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